

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STANLEY EARL DANIELS,

Defendant-Appellant.

UNPUBLISHED

November 16, 2006

No. 263346

Wayne Circuit Court

LC No. 04-012249-01

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to prison terms of 20 to 60 years for the assault conviction and two years for the felony firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was wrongfully denied his right to present a defense when the trial court denied his request to admit evidence of the victim's reputation for violence under MRE 404(a)(2). We find no abuse of discretion in the trial court's evidentiary ruling because MRE 404(a)(2) explicitly addresses only the character traits of a deceased in a homicide case, *People v Harris*, 458 Mich 310, 316-17; 583 NW2d 680 (1998), and this is not a homicide case. Further, defendant was not denied the right to present a defense as a result of the court's ruling. The court permitted defendant to introduce evidence regarding specific threats of violence by the victim toward defendant. The court also permitted defendant to introduce evidence of the encounter that he and the victim had the day before the shooting during which defendant alleges that the victim hit him in his back and verbally threatened him. Defendant was not denied his right to present a defense and, therefore, defendant's claim is without merit.

Defendant next argues that prosecutorial misconduct denied him his right to a fair trial. Because defendant did not object to the allegedly improper comments, we review this unpreserved claim for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of the defendant's argument." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a

prosecutor's remarks depends on all the facts of the case, *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). and a prosecutor is "given great latitude to argue the evidence and all inferences relating to his theory of the case." *Thomas*, *supra* at 456.

Defendant argues that the prosecutor improperly commented on defendant's use of an alias. We disagree. When defendant was arrested he told the police that his name was Larry Childs. Defendant also admitted to using the alias of Kenneth Daniels on a previous occasion to conceal his identity. A defendant's use of an alias is relevant to his credibility. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). Because defendant's credibility was at issue, the prosecutor's questions and comments were proper.

Although defendant also claims that a second incident of prosecutorial misconduct denied him a fair trial, we are unable to determine the nature of defendant's claim. Defendant cites to the prosecutor's closing argument where the prosecutor discusses his self-defense claim; however, defendant fails to put forth an argument for why this was improper. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). Because defendant has failed to clearly state his claim for appeal, we cannot determine if the prosecutor engaged in misconduct. For that reason, defendant has abandoned this issue for appellate review. *Matuszak*, *supra* at 59.

Defendant next argues that he was denied the effective assistance of counsel by his attorney's failure to request jury instructions on the offenses of felonious assault, assault with intent to commit great bodily harm, aggravated assault, intentionally aiming a firearm without malice, and discharge of a firearm aimed intentionally but without malice. Because the trial court did not hold an evidentiary hearing, review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To establish a claim of ineffective assistance of counsel a defendant must show: (1) that his trial counsel's performance fell below an objective standard of reasonableness; and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, the defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994); *Walker*, *supra* at 545.

Although defendant maintains that a rational view of the evidence supported instructions for the offenses of felonious assault, assault with intent to commit great bodily harm, aggravated assault, intentionally aiming a firearm without malice, and discharge of a firearm aimed intentionally but without malice, defendant does not offer any evidence or argument to support his claim. Defendant merely announces his position but fails to argue how the facts of this case support the instructions listed above. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *Matuszak*, *supra* at 59.

Moreover, whether to request an instruction for a lesser offense falls within the purview of trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). Assault with intent to do great bodily harm less than murder is the only lesser included offense defendant claims should have been requested. Because it appears that defense counsel's theory was that defendant did not intend to shoot the victim but, rather, acted in self-defense, counsel's failure to request an instruction for this offense was likely trial strategy. Defendant has failed to show that he was denied the effective assistance of counsel.

Finally, defendant argues that the evidence is insufficient to sustain his assault conviction. We review an insufficiency of the evidence claim "in the light most favorable to the prosecutor and [determine] whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003), citing *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

To prove assault with intent to murder, the prosecution must show: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Brown*, 267 Mich App 141, 148; 703 NW2d 230 (2005). For assault with intent to murder, "the requisite intent may be gleaned from the nature of the defendant's acts constituting the assault, the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, [defendant's] conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made." *Brown, supra* at 149.

The prosecution presented sufficient evidence to support defendant's conviction. Evidence was presented showing that defendant and the victim got into an argument about a lighter. Several hours later, defendant and the victim came in contact with each other and again argued. The victim testified that defendant pushed him and he pushed defendant back, causing defendant to fall to the ground. Defendant then stood up, pulled out a gun, pointed it at the victim, and began shooting. As the victim ran, defendant followed him and continued to shoot him. Defendant ran from the scene after the victim fell to the ground.

Defendant claims that he lacked the intent necessary to commit the crime charged. "Intent, like any other fact, may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows." *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). Defendant's intent to commit the crime charged may be inferred from defendant's actions of pointing the gun at the victim and firing several shots at him, as well as his act of following the victim and continuing to shoot him. The prosecution presented sufficient evidence to support a finding that defendant committed an assault with intent to murder. *Brown, supra* at 148.

Defendant also argues that the verdict is against the great weight of the evidence. We disagree. We review an unpreserved great weight of the evidence claim for plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against

the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *Musser, supra* at 218-219. As discussed above, however, the evidence was sufficient to support the verdict.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot